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No. 87-588

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PEABODY COAL COMPANY,
Appellant,

VS.

THE STATE TAX COMMISSION OF MISSOURI,
CHARLES SCHNEIDER, and GEORGE LEACHMAN,
Appellees.

On Appeal From the Supreme Court of Missouri

APPELLEES' MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM

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MOTION OF APPELLEES

Appellees move this Court to dismiss Appellant's appeal for want of jurisdiction in this Court, or, in the alternative, to affirm the decision of the Supreme Court of Missouri en banc entered on June 16, 1987, from which the Appellant has taken an appeal pursuant to 28 U.S.C. §1257(2).

STATEMENT

Appellee Charles Schneider, Assessor for St. Louis County and Appellant Peabody Coal Company submitted this matter to the Appellee State Tax Commission of Missouri upon a Joint Stipulation of Facts.

Peabody, whose principal office is located in the City of St. Louis, filed its 1983 St. Louis County personal property declaration on February 28, 1983. The declaration included two aircraft owned or controlled by Peabody on January 1, 1983. The aircraft - - N 306 PC (a Rockwell Sabreliner) and N 302 PC (a Beechcraft King Air) - - are hangared in St. Louis County when they are in the St. Louis area.

By letter dated May 9, 1983, Appellee Assessor determined that the entire values of the aircraft were taxable in St. Louis County.

In response to a timely appeal of the assessment, the Board of Equalization of St. Louis County held a hearing and subsequently reduced the assessed valuation of N 306 PC. Peabody filed a timely appeal of the Board's decision to the State Tax Commission. On December 29, 1983, Peabody paid under protest the entire personal property tax billed to it with respect to the aircraft to the Appellee Collector of Revenue of St. Louis County.

Peabody and affiliated corporations are engaged principally in the operation of underground and surface coal mines throughout the United States, and the provision of marketing and other support services for those coal mining operations. Aircraft N 302 PC was and is, and N 306 PC was, until its sale in April 1983, used exclusively in conducting the interstate business of Peabody and its affiliates. The aircraft are not used in the commercial conveyance of passengers or cargo for hire. No revenue is derived directly from the operations of these aircraft. Peabody has not asserted any claims that the aircraft are maintained or serviced outside St. Louis County, or that hangar space is rented elsewhere.

In its appeal to the Supreme Court of Missouri, Peabody limited its claim for additional tax situs to Indiana, the state most often visited by its aircraft. According to stipulated flight logs, N 302 PC spent 73.7% of the time in 1982 in St. Louis

County. In 1982, N 302 PC made trips to nineteen states. Fourteen of these states were visited fewer than ten times all year. Only five states were visited on an average of at least once per month. Aircraft N 302 PC spent only 4.1% of the time in 1982 on the ground in Indiana, the state it visited most frequently.

Aircraft N 306 PC spent 75.1% of the time in 1982 in St. Louis County. This time ranged from a low of 60.1% of the hours in March, to a high of 94.3% of the hours in July. In eight months, N 306 PC was in St. Louis County more than 77% of the time. In 1982, N 306 PC made trips to twenty-eight states and Washington, D.C. Twenty-three states were visited less than once per month. Only one state, Indiana, was visited on an average of at least twice per month. Aircraft N 306 PC spent only 1.4% of the time in 1982 on the ground in Indiana, the state it visited most frequently. In five of those months, N 306 PC was in Indiana 0.5% or less of the time.

Aircraft N 306 PC was on the ground in West Virginia only 1.6% of the hours in 1982, when it made twenty trips to seven cities. In four months N 306 PC was never present in West Virginia; it made one trip in each of three other months. Aircraft N 306 PC was on the ground in Florida for 3.4% of the time in 1982, when it completed twelve trips to eight cities. In seven months, N 306 PC never entered Florida, while it made only one trip in each of two other months.

Aircraft N 306 PC was on the ground in Arizona for 1.8% of the time in 1982, when it made twelve trips to two cities. Aircraft N 306 PC was never present in Arizona during five months, and it made only one visit in each of three months.

Aircraft N 306 PC spent only 2.4% of the time in 1982 on the ground at National Airport in Washington, D.C., where it made ten trips. In four months, N 306 PC was never present in Washington, D.C., while it made only one trip in each of six additional months.

Peabody's aircraft maintained a habitual and regular presence in St. Louis County. Contacts with other states were irregular, infrequent, and for only brief periods of time.

The State Tax Commission of Missouri found that (1) the Commerce Clause of the United States Constitution does not require apportionment because the ad valorem taxation of the aircraft in Missouri did not impermissibly burden interstate commerce; and (2) the Due Process Clause does not require apportionment because the aircraft were permanently situated in St. Louis County and had not acquired a taxable situs in any other state.

Peabody appealed the State Tax Commission's decision to the Circuit Court of the City of St. Louis. The circuit court affirmed the order of the Commission, but rejected the Commission's finding that the aircraft were not instruments of interstate commerce. However, the court affirmed the Commission's findings that the aircraft were permantently situated in St. Louis County, did not acquire a tax situs in any state other than Missouri, and could be taxed in St. Louis County without apportionment. The court held that the Commission's finding was supported by competent and substantial evidence.

Dissatisfied with the circuit court's judgment affirming the ultimate holdings of the State Tax Commission, Peabody perfected an appeal to the Supreme Court of Missouri.

The Supreme Court of Missouri en banc affirmed the decision of the circuit court, concluding that on the basis of the stipulated facts, taxing authorities could properly find that the aircraft were permanently situated in St. Louis County so as to be subject to ad valorem taxation without apportionment. The court found that Peabody's aircraft did not have contacts with any other state sufficient to establish an alternative tax situs. The court also held that ad valorem taxation of Peabody's aircraft did not burden the corporation's unrelated interstate commerce.

BRIEF IN SUPPORT OF APPELLEES' MOTION

I. This Court Lacks Appellate Jurisdiction

This Court is without appellate jurisdiction pursuant to 28 U.S.C. §1257(2) because the Supreme Court of Missouri did not uphold a state statute against a claim that it is repugnant to the Constitution of the United States. The Supreme Court of Missouri did not directly pass upon the constitutionality of §§137.075 or 137.095 of the Missouri Revised Statutes of 1986; the case turned on the court's findings of fact. Peabody has not only not challenged the validity of either statute, it has not claimed that either statute is invalid as applied to its particular situation. The decision of the Supreme Court of Missouri rested on Peabody's failure to establish facts sufficient to support findings that an unapportioned tax burdened Peabody's interstate commerce or that the aircraft had acquired a tax situs in any state other than Missouri. *Peabody Coal Company v. State Tax Commission,* 731 S.W.2d 837 (Mo. banc 1987).

The appellate jurisdiction of this Court does not extend to an action of this nature; the decision of the Supreme Court of Missouri is reviewable, if at all, only by writ of certiorari. 28 U.S.C. §1257(3). Accordingly, the appeal should be dismissed, and, treating the jurisdictional statement as an application for a writ of certiorari, the writ should be denied. 28 U.S.C. §2103.

The writ should be denied because the decision of the Supreme Court of Missouri is obviously correct and involves no conflict of opinion or other basis for review by this Court. Review would require the resolution of questions of fact decided adversely to Peabody in the state courts. Furthermore, the stipulated facts are peculiar to this case and are not likely to recur in other cases.

II. This Case Does Not Present a Substantial Federal Question

Should this Court find that an appeal is the proper mode of review for this case, it should nevertheless dismiss the appeal because this case does not involve a substantial federal question.

Ad valorem taxes are imposed on the article taxed; the burden is on mere ownership. Ad valorem taxation of non-commercial aircraft is not a burden on the interstate commerce of owner corporations, and has never been held to be violative of the Commerce Clause. The Supreme Court of Missouri held that ad valorem taxation of Peabody's aircraft does not burden the interstate commerce of Peabody's unrelated business. *Peabody* at 838-39. Peabody has not attempted to challenge this finding in its Jurisdictional Statement.

Peabody appears to argue in its Jurisdictional Statement that there is a substantial federal question because many corporations operate their own private aircraft. However, Peabody has failed to articulate a substantial federal question because, in fact, there is none.

Peabody urges that a decision of this Court is necessary to resolve uncertainty for businesses that utilize private aircraft. There is no uncertainty. Private corporate aircraft are taxed, if at all, by the domiciliary state.

All the case law cited by Peabody in its Jurisdictional Statement pertains to the personal property of common carriers, where such property is used to carry passengers or cargo for hire. Despite the existence of thousands of corporately owned, non-commercial aircraft in this country, Peabody has failed to find any law to show that such aircraft are or should be held to have acquired a tax situs in nondomiciliary states visited on business unrelated to their operation as aircraft. A logical extension of a personal property tax apportionment requirement on aircraft not used as commercial carriers would be that per-

sonal property taxes on corporate automobiles also should be apportioned among states where irregular and/or infrequent trips are made. Apportionment requirements for non-commercial aircraft would result in astronomical administrative burdens for both owners and governments.

Even if this Court were to accept Peabody's view that its situation is analogous to the operation of commercial carriers' aircraft, the decision in *Northwest Airlines v. Minnesota,* 322 U.S. 292 (1944) is dispositive of the facts in this case. This Court's opinion in *Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment,* 347 U.S. 590 (1954) merely delineated a fact situation in which the taxpayer could make the required showing of multiple taxing authorities. In *Northwest,* this Court allowed unapportioned ad valorem taxation by the domiciliary state where a taxpayer could not demonstrate that the property had acquired a tax situs in another jurisdiction. *Northwest* at 295-96. The only question involved here is one of fact, the same question that was presented in *Northwest:* whether Peabody's aircraft had contacts with a state other than Missouri sufficient to establish an alternate tax situs. The answer is no. Peabody has simply failed to meet this burden of proof. *Northwest* is the controlling case.

Peabody has not established that it maintained a habitual presence, rented ground space, picked up or delivered cargo or passengers for hire, had its planes maintained or otherwise serviced, or earned revenue directly from the operation of the aircraft in Indiana or any other state. The courts in the cases cited by Peabody in its Jurisdictional Statement relied on these factors to find that commercial carriers had acquired tax situses in nondomiciliary states. Peabody is merely attempting to find a creative means to avoid a lawful tax imposed in Missouri, the state where its aircraft are situated.

III. Other Grounds for Dismissal

This Court should dismiss Peabody's appeal because the constitutional issues are not ripe. Peabody is in no danger of immediate harm. Peabody further lacks standing to appeal because it has not suffered any injury in fact. There is no personal harm that a decision by this Court in Peabody's favor would eliminate. *Warth v. Seldin,* 422 U.S. 490 (1975).

While the cases do state that nondomiciliary states need not actually try to impose a tax but merely have the constitutional power to do so, the jurisdiction of this Court requires that appellant suffer some threat of immediate injury. *Rescue Army v. Municipal Court,* 331 U.S. 549 (1947). On argument before the Supreme Court of Missouri, Peabody admitted that Indiana, the only state where it is claiming to have an additional tax situs, did not even have a statute that would have permitted the imposition of an ad valorem personal property tax in 1983. Under the facts of this case, Peabody is not in any immediate danger of suffering a multiple tax burden: no state other than Missouri, the domiciliary, had authority to levy an ad valorem tax in 1983. Until such time as a second state seeks to impose a multiple tax burden, there is no need for this Court to address the question of the necessity for apportionment of ad valorem taxes on private corporate aircraft.

IV. If This Court Finds Jurisdiction It Should Affirm The Decision Of The Supreme Court of Missouri

In the alternative to their motion to dismiss, Appellees have moved this Court to affirm the decision of the Supreme Court of Missouri en banc of June 16, 1987, on the grounds that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument and the decision is clearly correct.

The decision of the Supreme Court of Missouri rests on factual findings, which this Court customarily accepts in the

absence of exceptional circumstances. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). There are no exceptional circumstances here. The State Tax Commission of Missouri, the Circuit Court of St. Louis, and the Supreme Court of Missouri all found that Peabody failed to establish facts sufficient to prove that its aircraft acquired a tax situs in another state. Not one of these bodies found that unapportioned ad valorem taxation of Peabody's aircraft impermissibly burdened Peabody's commerce. In fact, Peabody has abandoned any claim that Missouri's unapportioned ad valorem tax on its aircraft constitutes an impermissible burden in violation of the Commerce Clause of the United States Constitution.

CONCLUSION

For the foregoing reasons, appellant's Appeal should be dismissed for want of jurisdiction in this Court, or, in the alternative, the judgment of the Supreme Court of Missouri should be affirmed.

Respectfully submitted,

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